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BEFORE THE TENNESSEE REGULATORY AUTHORITY AT
NASHVILLE, TENNESSEE

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OFFICE OF THE
EXECUTIVE SECRETARY

IN RE:

APPLICATION OF MEMPHIS NETWORKX, L.L.C.
FOR A CERTIFICATE OF PUBLIC CONVENIENCE
AND NECESSITY TO PROVIDE INTRASTATE
TELECOMMUNICATION SERVICES AND JOINT
PETITION OF MEMPHIS LIGHT GAS & WATER
DIVISION, A DIVISION OF THE CITY OF MEMPHIS,
TENNESSEE ("MLGW") AND A&L NETWORKS-
TENNESSEE, L.L.C. ("A&L") FOR APPROVAL OF
AGREEMENT BETWEEN MLGW AND A&L REGARDING
JOINT OWNERSHIP OF MEMPHIS NETWORKX, LLC.

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) **DOCKET NO.**
) **99-00909**
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ORDER RE: PENDING PRE-HEARING MOTIONS

This matter is before the Pre-Hearing Officer to consider several pending motions filed by the parties. On June 22, 2000, the Tennessee Regulatory Authority ("Authority") filed a Notice of Hearing and Pre-Hearing Conference in this matter. Pursuant to that Notice, a Pre-Hearing Conference was held on July 6, 2000 for the purposes of resolving any outstanding procedural matters, resolving any pending motions, considering the filing of stipulations/admissions of facts and documents, and establishing the orderly conduct of the hearing. The Motions pending at the time of the Pre-Hearing Conference were:

1. Motion to Lift Protective Order filed by Time Warner Communications of the Mid-South L.P. ("Time Warner"), Time Warner Telecom of the Mid-

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South L.P. (“Time Warner Telecom”) and the Tennessee Cable Telecommunications Association (the “TCTA”) on May 1, 2000.

2. Objection to Certain Pre-Filed Testimony of Brent E. Hall on Behalf of the International Brotherhood of Electrical Workers Local 1288 (the “IBEW”) and Motion to Strike filed by Memphis Networx, LLC, Memphis Light Gas & Water Division and A&L Networks-Tennessee, LLC (“Applicant and Joint Petitioners”) on June 8, 2000.

3. Motion to Reschedule Hearing and Motion to Close Discovery filed by the Applicant and Joint Petitioners on June 12, 2000.

4. Motion to Reschedule Hearing filed by Time Warner and the TCTA on June 29, 2000.

Procedural History

Pursuant to the original procedural schedule, as approved by the Authority at the March 14, 2000 Authority Conference, this matter was originally set for hearing on March 29 and 30, 2000. After several Status Conferences and following a determination by the Pre-Hearing Officer that the case was not in a posture to proceed to hearing on the original dates, the hearing was rescheduled for April 13 and 14, 2000.

On March 17, 2000, after receiving responses of the Applicant and Joint Petitioners to discovery requests, Time Warner filed a request to take the depositions of five persons: John McCullough, Wade Stinson, Larry Thompson, Joel Halverson and Alex Lowe. On March 23, 2000, the Applicant and Joint Petitioners pre-filed rebuttal testimony from John McCullough and Wade Stinson, thereby making those witnesses available at the hearing for

cross-examination. During a Status Conference held on March 24, 2000, the Intervenor¹ agreed to reduce the request for depositions from five to two witnesses: Larry Thompson and Alex Lowe. The Pre-Hearing Officer ruled at a Status Conference held on March 29, 2000 that both Mr. Thompson and Mr. Lowe should give deposition testimony which could be used by the Intervenor, if desired, during the hearing. The depositions were scheduled to take place on April 6, 2000. Rather than proceed with the depositions, the parties agreed on April 6 that the depositions would not go forward and that the witnesses would instead give live testimony at the hearing.

In the opinion of the Pre-Hearing Officer, the addition of live testimony by two witnesses expanded the time required for the hearing; therefore, the parties were notified in writing of the need to change the hearing dates to allow more consecutive days for the hearing. An order reflecting that decision was issued by the Pre-Hearing Officer on Monday, April 10, 2000. During the Authority Conference held on April 11, 2000, the Authority affirmed the Pre-Hearing Officer's Order and moved the hearing from April 13 and 14, 2000 to the first week in May, 2000. On April 12, 2000, the Authority issued a Notice that reset this case for hearing for May 1 through May 5, 2000.

On May 1, 2000, the Applicant and Joint Petitioners, together with the Intervenor, requested a postponement of the commencement of the hearing to permit the parties to continue settlement negotiations that they had initiated the day before. The Directors voted unanimously to permit the parties to use May 1, 2000 to finalize their settlement negotiations.

¹ Intervenor include Time Warner, Time Warner Telecom, the TCTA, NEXTLINK, Tennessee, Inc., BellSouth Telecommunications, Inc., Concord Telephone Exchange, Inc., Humphreys County Telephone Co., Tellico Telephone Company, Inc., Tennessee Telephone Company, the IBEW, and the Consumer Advocate.

On May 2, 2000, the Applicant and Joint Petitioners, Time Warner, the TCTA and NEXTLINK Tennessee, Inc. ("NEXTLINK") filed a settlement agreement entitled "Amended Application of Memphis Networx, LLC" (the "Amended Application"), which was signed by each of these parties. After hearing comments from the parties, a majority of the Directors² voted to postpone the hearing in this docket and to remand this matter back to the Pre-Hearing Officer. The Pre-Hearing Officer was directed to conduct a Status Conference for the purposes of establishing a new procedural schedule, determining the current positions of the parties and developing a framework for determining whether Authority Staff should assume the role of a party in this action in order to present evidence and cross-examine witnesses on issues that were no longer supported by the Intervenors.

A Status Conference was held on May 2, 2000 with all parties in attendance. Based upon the remarks of the parties during the Status Conference regarding the impact of the Amended Application on the posture of the case, the Pre-Hearing Officer determined that the hearing would be postponed until after the parties submitted specific filings to the Authority. The Pre-Hearing Officer developed a procedural schedule which provided for: 1) the filing of Authority Staff data requests and responses thereto from the Applicant and Joint Petitioners; 2) written explanation by the parties as to how the Amended Application resolves the original nine (9) issues; and 3) additional pre-filed testimony by the Applicant and Joint Petitioners.

The first request of the Applicant and Joint Petitioners to reset this case for hearing was filed on May 12, 2000, one day after they responded to the Authority Staff's data requests. This request was filed on the same day that the Applicant and Joint Petitioners responded to the motion of the IBEW for an expanded role in this case and to the motion of

² Chairman Melvin Malone voted to proceed with the Hearing as scheduled.

the Consumer Advocate Division, Office of the Attorney General, (the "Consumer Advocate") for intervention. Thereafter, the Pre-Hearing Officer determined that the role of the IBEW, as a limited Intervenor, should be expanded and also granted limited intervention to the Consumer Advocate. An Order reflecting those rulings was issued on May 22, 2000.

On June 1, 2000, Time Warner and the TCTA filed a Motion to Bifurcate the Hearing which included a request not to have the hearing reset between June 20 and July 5, 2000 due to the unavailability of one of the parties' trial counsel who was scheduled to be out of town during that time period. On June 5, 2000, the Applicant and Joint Petitioners filed a letter with the Authority requesting to be heard at the June 6th Authority Conference for the purpose of setting a hearing date. The Directors permitted the Applicant and Joint Petitioners to present their request and instructed the Pre-Hearing Officer to hold a Status Conference to discuss with all parties the resetting of this case for hearing.

At the June 6th Status Conference, with all parties participating, the Pre-Hearing Officer heard to the comments of all parties regarding the Motion to Bifurcate the Hearing filed by Time Warner and the TCTA. The discussion revealed that there was a difference of opinion between certain parties as to how the Amended Application would be considered in the context of the hearing on the merits. The Pre-Hearing Officer also discussed potential hearing dates and informed the parties that the week of July 17, 2000 would be the first week wherein there would be a sufficient number days available for the hearing. The Pre-Hearing Officer instructed the parties to meet and attempt to resolve the issues raised by the Motion to Bifurcate.

On June 9, 2000, the Pre-Hearing Officer was contacted by the parties to this action and informed that the parties no longer supported the Settlement Agreement and that the

Amended Application would be withdrawn. On June 12, 2000, the Applicant and Joint Petitioners filed a letter with the Authority withdrawing the Amended Application and advising the Authority that they wished to proceed on the original Application. Also, on June 12, 2000, the Applicant and Joint Petitioners filed a Motion to Set Hearing and to Close Discovery. No party filed an objection or response to the Motion to Set Hearing. The Authority sent out a Notice on June 22, 2000 resetting this case for hearing on July 17, 18, 19 and 20, 2000 and setting the Pre-Hearing Conference for July 6, 2000.

Time Warner, Time Warner Telecom and the TCTA's Motion to Lift Protective Order

Time Warner, Time Warner Telecom and the TCTA (the "Movants") filed a Motion to Lift Protective Order ("Motion to Lift") on May 1, 2000 seeking to remove certain financial information regarding the Applicant and Joint Petitioners from the operation of the Protective Order. Time Warner stated that the Applicant and Joint Petitioners had not made a showing that the information Time Warner sought would cause irreparable harm or a competitive disadvantage if disclosed. Further, Time Warner stated that the Joint Petitioners' association with MLG&W, a public entity, made the financial information a matter of public record.

The Applicant and Joint Petitioners filed a response to the Motion to Lift stating that whether a document is a public record is an issue vested exclusively with the Chancery Courts of Tennessee. The Applicant and Joint Petitioners asserted that the Authority should not proceed to release documents from the Protective Order until the conclusion of the proceedings in the Chancery Court of Shelby County, Tennessee, regarding this issue. Additionally, the Applicant and Joint Petitioners stated that the release of the requested

documents would cause irreparable harm and competitive disadvantage to the Applicant and Joint Petitioners.

After hearing oral argument from counsel for the Movants and for the Applicant and Joint Petitioners during the Pre-Hearing Conference on July 6, 2000, the Pre-Hearing Officer decided to hold the Motion to Lift in abeyance and requested those parties to provide additional information regarding the specific documents in question. On July 7, 2000, the Pre-Hearing Officer sent the Movants and Applicant and Joint Petitioners a letter requesting that the additional information be filed no later than 2:00 p.m. on July 11, 2000.

Applicant and Joint Petitioners' Objections and Motion to Strike Testimony

The IBEW filed the Pre-Filed Testimony of its witness, Brent Hall, on June 6, 2000. On June 8, 2000, the Applicant and Joint Petitioners filed objections to portions of Mr. Hall's testimony and a Motion to Strike those objectionable portions. Specifically, the Applicant and Joint Petitioners objected to the portion of Mr. Hall's testimony relating to the alleged violations of the Memorandum of Understanding between MLG&W and the IBEW as being outside the scope of the issues to be determined in this proceeding pursuant to the Pre-Hearing Officer's Order entered May 22, 2000. The Applicant and Joint Petitioners argued that the Pre-Hearing Officer's Order of April 25, 2000 determined that two (2) of the issues submitted by IBEW were outside the scope of this proceeding.³ The Applicant and Joint

³ In the Order dated April 25, 2000, the Pre-Hearing Officer determined that Issue Nos. 2 and 5 were outside the scope of the issues in this docket. These issues are:

Issue No. 2 – Questions relating to the intentions of MLG&W with respect to the creation of similar joint ventures in the future which will take over its gas, water and/or electric operations.

Issue No. 5 – Questions relating to why MLG&W is going into business with an out-of-state company that is non-union and pays low wages to its employees, and the impact of such on the Memorandum of Understanding, the IBEW and its members.

Petitioners also stated that the Order dated May 22, 2000 expanding the role of the IBEW in this proceeding reiterated that the scope of cross examination should be as set forth in the April 25, 2000 Order.

Additionally, the Applicant and Joint Petitioners objected to testimony relating to the business entity chosen for the joint venture and MLG&W's intentions with respect to the creation of similar ventures in the future which would take over other utility operations. The Applicant and Joint Petitioners maintained that the form of business entity chosen for the telecommunications venture was authorized by statute. Therefore, the Applicant and Joint Petitioners moved to strike the testimony of Mr. Hall found on pages 5 through 7 of his Pre-Filed Testimony.

The IBEW filed its response to the objections and Motion to Strike on June 12, 2000. The IBEW maintained that the disputed portions of Mr. Hall's testimony were not outside the scope of the issues in this proceeding and further stated that the May 22, 2000 Order expanding the role of the IBEW in this proceeding did not limit the areas on which the IBEW may question its own witness on direct examination. The IBEW asserted that issues involving labor relations among the IBEW, MLG&W, and the proposed joint venture impact not only the interests and legal rights of the members of the IBEW, but those of the general public. Further, the IBEW stated that the proposed joint venture might lead to violations of the Memorandum of Understanding, but that such a determination was a question of fact to be resolved by the Authority. The IBEW concluded that Mr. Hall's Pre-Filed Testimony should be admitted in its entirety.

After considering oral argument from counsel for the IBEW and Applicant and Joint Petitioners during the July 6th Pre-Hearing Conference, reviewing the Motion and Response

and the Pre-Filed Testimony of Mr. Hall and the April 25th Order, the Pre-Hearing Officer now grants the Motion in part and denies the Motion in part. The Pre-Hearing Officer grants the objection set forth in Paragraph 4 of the objections and Motion and hereby strikes that portion of the pre-filed testimony. The Pre-Hearing Officer denies the remaining objections and paragraphs of the Motion to Strike.

The April 25th Order granting intervention to the IBEW stated that:

Tenn. Code Ann. § 7-52-103(d) specifically provides that the Authority shall not act on the proposed joint venture agreement until “after notice and opportunity to be heard has been extended to interested parties.” The inclusion of such language in this statute indicates that the Tennessee General Assembly wanted to provide to parties who may have interests that will be affected by such a joint venture agreement the ability to voice their interests and concerns to the Authority. Tenn. Code Ann. § 7-52-103(d) permits the IBEW to voice its interests and concerns about the proposed joint venture agreement to the Authority. (April 25, 2000 Order, p. 6)

The Pre-Hearing Officer determined that certain areas of cross-examination proposed by the IBEW are material and that the IBEW should be given the opportunity to question witnesses on those areas. The April 25th Order, however, also placed a restriction on cross-examination questions which sought to elicit testimony concerning the intent of MLG&W “with respect to the creation of similar joint ventures” and with respect to “going into business with an out-of-state company that is non-union and pays low wages to its employees...” (Issue Nos. 2 and 5 of the IBEW’s proposed cross-examination).

Certain portions of Mr. Hall’s Pre-filed Testimony question the intent of MLG&W regarding future ventures. The Pre-Hearing Officer has determined that MLG&W’s intentions in entering into the joint venture and the impact of such intentions on the Memorandum of Understanding are not material to the issues under consideration in this case. As argued by the Applicant and Joint Petitioners, the General Assembly has acted to

permit MLG&W to enter into joint ventures, so intent is not material in this proceeding. As for the remaining testimony, the Pre-Hearing Officer determines that the direct testimony of Mr. Hall permits the IBEW to present its concerns in this forum as provided for in Tenn. Code Ann. § 7-52-103(d). Therefore, the Applicant and Joint Petitioner's objection set forth in Paragraph 4 of the objections and Motion to Strike is granted and that portion stricken from the pre-filed testimony. The remaining objections are denied.

Applicant and Joint Petitioners Motion to Close Discovery

The Notice setting this case for Hearing rendered moot the Applicant and Joint Petitioners' Motion to Reschedule a hearing; however, the accompanying Motion to Close Discovery filed on June 12, 2000 remained at issue at the July 6th Pre-Hearing Conference. The Applicant and Joint Petitioners proffered that they had responded to data requests from the TCTA, NEXTLINK, and the Authority and additionally that numerous documents had been produced and depositions taken in this matter. Based upon these factors, the Applicant and Joint Petitioners requested that discovery in this matter be closed.

During the Pre-Hearing Conference, Time Warner and the TCTA argued that discovery should be closed only as to "new" discovery in this matter and that the motion should not encompass the duty of any party to respond to outstanding discovery. Further, Time Warner stated that the Applicant and Joint Petitioners were under a continuing obligation to keep already produced discovery current. The Pre-Hearing Officer granted the Motion of the Applicant and Joint Petitioners only as to "new" discovery requests. The Pre-Hearing Officer ordered the parties to discuss and resolve any outstanding discovery requests.

Time Warner and the TCTA Motion to Reschedule Hearing

Time Warner and the TCTA (“Movants”) filed their Motion to Reschedule Hearing on June 29, 2000. The request is based on the unavailability of “their sole expert witness and technical analyst/consultant, William H. Barta,” who, the Movants stated, has a prior commitment to appear before the Florida Public Service Commission (“FPSC”). The Movants further asserted that Mr. Barta had this commitment to appear in the FPSC proceeding before the date of the Authority’s Notice of June 22, 2000 setting this case for hearing. The Motion was not supported by exhibit or affidavit. The Applicant and Joint Petitioners responded to the Motion on July 3, 2000. The Response pointed out that at no time prior to the motion filed on June 29, 2000 did the Movants inform the parties, the Pre-Hearing Officer or the Authority of the potential unavailability of Mr. Barta for the hearing in this case should it be reset for the week of July 17, 2000. During the July 6th Pre-Hearing Conference, the Movants withdrew their Motion to Reschedule the Hearing.

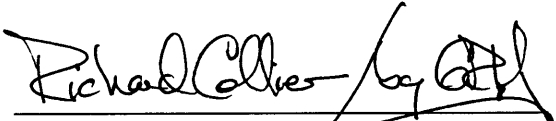
Based upon the foregoing findings and conclusions,

IT IS THEREFORE ORDERED THAT:


1. The Motion to Lift the Protective Order filed by Time Warner, Time Warner Telecom and the TCTA is, at this time, held in abeyance;
2. The Objections and Motion to Strike filed by the Applicant and Joint Petitioners is granted as to paragraph 4 of the Motion. The remaining objections and paragraphs of the Motion to Strike are denied;
3. The Motion to Close Discovery filed by Applicant and Joint Petitioners is granted as to any “new” discovery requests. The parties are directed to resolve any outstanding discovery requests;

4. As the Motion to Reschedule Hearing has been withdrawn by Time Warner and the TCTA, the Hearing in this matter will proceed on July 17, 18, 19 and 20, as scheduled; and

5. Any party aggrieved by any decision of the Pre-Hearing Officer in this matter may file a Petition for Appeal with the Tennessee Regulatory Authority.


RICHARD COLLIER ACTING AS
PRE-HEARING OFFICER

ATTEST:



K. David Waddell, Executive Secretary